STATE OF MICHIGAN

COURT OF APPEALS

LULA ELEZOVIC,

Plaintiff-Appellant/Cross Appellee,

and

JOSEPH ELEZOVIC,

Plaintiff,

v

DANIEL P. BENNETT,

Defendant-Appellee/Cross Appellant,

and

FORD MOTOR COMPANY,

Defendant.

FOR PUBLICATION
January 25, 2007
9:00 a.m.

No. 267747
Wayne Circuit Court
LC No. 99-934515-NO

Official Reported Version

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

TALBOT, J. (*dissenting).*

I respectfully dissent. Specifically, I believe the majority's conclusion, holding defendant Daniel P. Bennett individually liable under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, as an agent of the Ford Motor Company, is inconsistent and incompatible with the definitional requirements necessary to establish Bennett as an agent and, consequently, as an employer under the CRA. I would, therefore, affirm the trial court's decision to grant summary disposition in favor of Bennett on plaintiff Lula Elezovic's hostile work environment claim.

This case is once again before this Court, having already generated two published decisions in *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2003), aff'd in part and rev'd in part 472 Mich 408 (2005). This appeal arises from allegations by plaintiff that, while an employee of the Ford Motor Company, she was subject to ongoing sexual harassment by Bennett, her former supervisor. Specifically, plaintiff appeals the grant of summary

disposition in favor of Bennett on plaintiff's hostile work environment claim based on the trial court's determination that defendant was not acting as "an agent" of Ford when he committed the alleged acts of sexual harassment and, therefore, was not "an employer" for imposition of individual liability under the CRA.

This appeal is a necessary extension of the Supreme Court's analysis of plaintiff's claim of hostile work environment sexual harassment, *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005), in which the Court addressed the issue of individual liability under the CRA. The Supreme Court began its analysis by examining the language of the relevant statutory definitions. The Supreme Court noted that "the statute expressly defines an 'employer' as a 'person,' which is defined under MCL 37.2103(g) to include a corporation, and also states that an 'employer' includes an 'agent of that person.' MCL 37.2201(a)." *Id.* at 419-420. On the basis of this language, the Supreme Court determined that use of the term "agent" within the statutory definition of "employer" was not restricted solely to the establishment of vicarious liability of the agent's employer. Rather, the Supreme Court held that the term "agent" could also encompass the imposition of individual liability on an agent who engages in sexually harassing behavior. *Id.* at 426. The Supreme Court specifically declined to engage in the next step in the analysis and consider whether Bennett, as plaintiff's supervisor, qualified as an agent if, in harassing plaintiff, he acted beyond the scope of his authority. *Id.* at 422 n 20, 431. As a result, this Court must determine whether an agent acting outside the scope of his authority can be defined as an "employer" in accordance with the CRA for imposition of individual liability.

"Through the Civil Rights Act, Michigan law recognizes that, in employment, freedom from discrimination because of sex is a civil right. MCL 37.2102 . . . . Employers are prohibited from violating this right, MCL 37.2202 . . . ." *Chambers v Trettco, Inc*, 463 Mich 297, 309; 614 NW2d 910 (2000). The CRA "expressly addresses an employer's vicarious liability for sexual harassment committed by its employees by defining 'employer' to include both the employer *and* the employer's agents. MCL 37.2201(a)." *Chambers, supra* at 310 (emphasis in original).

MCL 37.2201(a) defines the term "employer" as "a person who has 1 or more employees, and includes an agent of that person." The Michigan Supreme Court concluded in *Elezovic*, *supra* at 426, in relevant part, that "[b]ecause we find that . . . inclusion of an 'agent' within the definition of the word 'employer' is not limited to establishing vicarious liability for the agent's employer, but in fact means agents are considered employers," "liability under our CRA applies to an agent who sexually harasses an employee in the workplace." However, the Supreme Court in *Elezovic* did not hold or imply that Bennett had committed the alleged acts of harassment in his capacity as an agent of Ford, his employer. *Elezovic*, *supra* at 422 n 20. In summarizing the relevant portion of its holding in *Elezovic*, *supra* at 411, the Supreme Court reiterated "that an agent *may* be individually sued under § 37.2202(1)(a)." (Emphasis added.)

The majority appears to elevate this holding to the imposition of strict liability while ignoring the accepted definition of the term "agent," which is necessary to establish Bennett as an "employer" for the imposition of individual liability. Specifically, the majority states:

> An agent can be held directly and individually liable if he engaged in discriminatory behavior in violation of the CRA while acting in his capacity as the victim's employer. Therefore, if plaintiff can establish a prima facie case of

> hostile work environment sexual harassment against defendant, her supervisor, absent the respondeat superior requirement, she may be found entitled to damages for which defendant is individually liable. [*Ante* at ___.]

This effectively ignores both the prior caselaw determining the requirements for establishing liability under an agency relationship and, impliedly, alters the elements necessary to establish a prima facie case of hostile work environment sexual harassment by eliminating the respondeat superior requirement.

In responding to the dissent, the majority relies on an isolated statement from *Radtke v Everett*, 442 Mich 368, 397; 501 NW2d 155 (1993) that "if an *employer* is accused of sexual harassment, then the respondeat superior inquiry is unnecessary . . . ." This reliance is misplaced. Notably, the *Radtke* decision was issued 12 years before the Supreme Court's ruling in *Elezovic*, and did not address the imposition of individual liability in the context of agency. *Radtke* is further distinguishable because, in that case, the harasser was coextensive with his business, being both owner and employer, and was effectively imputed to be the alter ego of the business rather than an agent. Hence, use of the term *"employer"* in *Radtke* carries a vastly different meaning and connotation and, consequently, was not used by the Supreme Court in the same context as currently advocated in *Elezovic* for purposes of imposing individual liability on an agent. In addition, the majority failed to note that *Radtke* is inapposite to its reasoning, because it required proof of vicarious liability in a hostile work environment action, stating, in relevant part: "'Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no *quid pro quo* exists. The supervisor does not act as the company; the supervisor acts outside the scope of actual or apparent authority to hire, fire, discipline, or promote.'" *Radtke, supra* at 396 n 46, quoting *Steele v Offshore Shipbuilding, Inc,* 867 F2d 1311, 1316 (CA 11, 1989) (internal quotation omitted). Hence, the majority's failure to incorporate the longstanding requirements and definitions of agency in order to impose strict liability for an agent, as an employer, in the context of hostile work environment sexual harassment, is in error.

The question central to the resolution of this case is whether Bennett acted as Ford's agent when he committed the claimed acts of sexual harassment. The CRA does not specifically define the term "agent" of the employer, see MCL 37.2201, and no published decision of this Court or the Michigan Supreme Court has yet interpreted the contours of this term as it appears in the CRA. The Michigan Supreme Court has explained, however, that the definition of the employer-agent relationship depends on principles of common-law agency: "Because the Civil Rights Act expressly defines 'employer' to include agents, we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees." *Chambers, supra* at 311.

Michigan has long recognized the following general common-law principles governing principal-agent relationships:

> "An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal." Bowstead on Agency (4th Ed), p. 1.

> "An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do." 2 C.J.S. p. 1025. [*Stephenson v Golden (On Rehearing)*, 279 Mich 710, 734-735; 276 NW 849 (1937).]

"Among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created." *Leo Austrian & Co v Springer*, 94 Mich 343, 350; 54 NW 50 (1892); see also *Field v Jack & Jill Ranch*, 343 Mich 273, 278-279; 72 NW2d 26 (1955) (explaining that an agent's powers are prima facie coextensive with the business entrusted to his care, and that the agent's authority includes "not only those things he is expressly told to do, but those things the principal knowingly acquiesces in his doing").

The parties do not dispute that Bennett was a Ford Motor Company superintendent, and that in this position he was an agent with actual authority, express or implied, to bind Ford regarding certain employment decisions affecting subordinate employees. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). The majority contends that because Bennett unquestionably occupied some agency position with respect to the Ford Motor Company, he meets the definition of an "agent" subject to individual liability for sexual harassment under MCL 37.2201(a). But the majority's contention disregards common-law principles delineating and defining agency relationships.

The term "agent" in MCL 37.2201(a) takes into account common-law principles regarding agency relationships, under which Bennett cannot be liable for the alleged acts of sexual harassment because they did not occur in the scope of any authority, express or implied, that Ford gave him. "Agents have the implied power to carry out all acts necessary in executing defendant's expressly conferred authority. Whether the act in question is within the authority granted depends upon the act's usual or necessary connection to accomplishing the purpose of the agency." *Smith, Hinchman & Grylls Assoc, Inc v City of Riverview*, 55 Mich App 703, 706; 223 NW2d 314 (1974) (internal citations omitted); see also *Grossman v Langer*, 269 Mich 506, 510; 257 NW 875 (1934) (reciting the "general rule . . . that the powers of an agent are *prima facie* coextensive with the business intrusted to his care").

Although plaintiff testified that Bennett committed several offensive acts tending to constitute sexual harassment in the workplace, these acts of discrimination do not have any "usual or necessary connection to accomplishing the purpose[s] of" Bennett's responsibilities as Ford's superintendent. *Smith, Hinchman & Grylls Assoc*, *supra* at 706. As the Michigan Supreme Court has observed with respect to the potential vicarious liability, under common-law agency principles, of an employer for an employee's acts allegedly creating a hostile work environment, "[W]e have noted that . . . *strict imposition of vicarious liability on an employer is illogical in a pure hostile environment setting because, generally, in such a case, the supervisor acts outside the scope of actual or apparent authority to hire, fire, discipline, or promote*." *Chambers*, *supra* at 311 (emphasis added; internal quotations and citation omitted). Notably, Bennett's acts of sexual harassment also contravened Ford's antidiscrimination policy, which the parties agree governed their relationship with Ford. Although Bennett's acts of sexual

discrimination violate the CRA, "[w]hen a purported agent is shown to have been acting outside the scope of the law, it is presumed that he was not acting within the scope of his duties for the . . . principal." *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 469-470; 350 NW2d 280 (1984), mod on other grounds on reh 135 Mich App 777 (1984), citing 3 CJS, Agency, § 493, p 391. Therefore, investing the term "agent" with the meaning ascribed to that term and the agency relationship under the common law, Bennett's acts of sexual harassment fall outside the actual authority that Ford vested in him. In other words, Bennett was not Ford's agent when he committed the acts of sexual harassment to which plaintiff testified. If Bennett was not Ford's agent, then he does not meet the definition of an "employer" in accordance with MCL 37.2201.

If interpretation of the term "agent" within MCL 37.2201(a) incorporates common-law agency concepts, then Bennett was not acting within his authority as Ford's agent when he performed the acts of sexual discrimination allegedly constituting a hostile work environment, and therefore, could not face individual liability under the CRA. Contrary to the majority's assertion, this determination neither precludes the probability of a defendant facing individual liability under the CRA nor contravenes the overriding intent of the statute. Individual liability is applicable in cases of quid pro quo harassment "because the quid pro quo harasser, by definition, uses the power of the employer to alter the terms and conditions of employment," thereby fulfilling the definitional requirements of MCL 37.2201. *Chambers, supra* at 311.[1] In addition, in cases where the elements of hostile work environment sexual harassment are fully and successfully established, the individual tortfeasor could also be subject to individual liability, thus fulfilling both the definitional requirements and language of the statute without the necessity of expanding the actual language of the statute to include the imposition of strict liability for conduct determined to be in violation of the act.

Because the undisputed facts reflect that Bennett's acts of sexual harassment occurred outside the scope of his authority as a Ford superintendent and violated Ford's antidiscrimination policy, the trial court properly granted Bennett summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff's CRA-based claim that his acts of sexual discrimination created a hostile work environment.

/s/ Michael J. Talbot

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[1] In addition, apart from the CRA, an individual agent conceivably could face individual liability in some circumstances for acts of discrimination that satisfy the elements of a tort. *Charvat v Gildemeister*, 222 Mich 286, 289; 192 NW 674 (1923) (observing that "in torts like this, the law does not consider agency at all but permits the wrongdoers to be sued jointly or severally"); *Burrows v Bidigare/Bublys, Inc*, 158 Mich App 175, 185; 404 NW2d 650 (1987) (concluding that "[t]he fact that the tortfeasor was an employee or agent of another person or corporation does not make him immune from suit for his breach of the duty imposed by law"), superseded by statute on other grounds, see *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367; 494 NW2d 1 (1992).